



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

---

Investigation on Motion of the Department of  
Natural Resources of an Alleged Unlawful  
Placement of Fill on the Bed of a Navigable  
Waterway Between Spinnet and Hewitt Lakes,  
Unlawful Placement of Fill in a Wetland, and  
Unlawful Excavation or Modification of Shoreline  
Creating a Diversion of Water on the Bed of  
Hewitt Lake, by Clifton R. Scudder a.k.a.  
Tapawingo Family Trust Limited Partnership,  
Town of Oma, Iron County

---

Case No.: 3-NO-99-B2263-NW

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

The Department of Natural Resources Northern Region staff conducted field investigations and allege that Mr. Clifton R. Scudder and/or the Tapawingo Family Trust Limited Partnership, Highway G, Mercer, Wisconsin, placed fill on the bed of a navigable waterway at a location between Spinnet and Hewitt Lakes, which also is obstructing navigation between said lakes; placed fill in a wetland area in the same "area between the lakes" location; and excavation, enlarged or otherwise modified an unauthorized "notch" in the bank of Hewitt Lake which also is creating an unauthorized diversion of water, all in the SW ¼ of Iron County, Wisconsin, in violation of Wis. Stat. §§ 30.12, 30.15, 30.18 and 30.19 and Wis. Admin. Code ch. NR 103. It is further alleged that the lakebed fill, wetland fill, and "notch" interfere with the rights and interests of the public on Spinnet and Hewitt Lakes.

It is alleged that the maintenance of said lakebed and wetland fill, and "notch" and the use associated with them on Spinnet and Hewitt Lakes is in violation of Wis. Stat. §§ 30.12, 30.15, 30.18 and 30.19 and Wis. Admin. Code ch. NR 103 and is declared to be a public nuisance by Wis. Stat. § 30.294.

It is further alleged, therefore, that said actions by the above-named respondent constitute a violation of Wis. Stat. §§ 30.12 and 30.15 and Wis. Admin. Code ch. NR 103.

Pursuant to due notice, hearing was held at Hurley, Wisconsin, on May 13-14, and September 23-26, 2002. The parties requested an opportunity to brief the issues, and the last submittal was received on December 23, 2002.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Cliffton R. Scudder, a/k/a Tapawingo Family Trust Limited Partnership, by

Attorney Donald Bach  
DeWitt, Ross & Stevens  
2 East Mifflin Street, Suite 600  
Madison, WI 53703

Wisconsin Department of Natural Resources, by

Attorney Michael D. Scott  
P. O. Box 7921  
Madison, WI 53707-7921

### FINDINGS OF FACT

1. Cliffton R. Scudder, a/k/a Tapawingo Family Trust Limited Partnership (Scudder/Tapawingo) owns real property located in the Town of Oma in Sections 9-16 and 21, Township 44 North, Range 4 East, Iron County. The above-described property abuts Spinnet and Hewitt Lakes and a channel which is navigable at the project site. The Clifton Scudder family has formed a limited partnership, which owns all of sections 9 through 16, and 21, in township range 44 north, the Town of Oma. The partnership is known as "Tapawingo," meaning "place of peace," according to Mr. Scudder. Partnership holdings include most of the lands surrounding Hewitt and Spinnet Lakes. The principal owners of the Tapawingo family partnership are the Scudders' three children, (33 per cent share each) and Clifton R. and Joanne S. Scudder (one half of one percent each). (T-19) The Scudders maintain a home on the south end of Hewitt Lake. Some portions of the property are kept in the managed forest lands (MFL) program. All of the MFL lands owned by Tapawingo are "closed" to the public within the meaning of the MFL program.

2. The road at issue goes from east to west across the navigable channel between Spinnet and Hewitt Lakes. It allows access to the old logging camp and other areas of the western portion of the property which are otherwise accessible from County Highway G. Scudder testified that the road was 12 to 14 feet wide at the time he purchased it in January 1996. The roadway has been in place for approximately fifty years. The parties agree that it was constructed some time between 1938 and 1950. It is likely an old logging road, and is constructed of a log corduroy base, over which fill has been placed numerous times. The Scudder family primarily uses the road to gain convenient access to an upland area the family uses as a camping spot. Further, the Scudder children enjoy traveling all of the Tapawingo property on all terrain vehicles (ATV's), and the family regularly uses the roadway to gain access to all of the property west of their home.

3. Hewitt Lake and Spinnet Lake are both exceptional public waters that are valuable resources of the state. The smaller of the two, Spinnet Lake is valuable because it is accessible directly off Highway G, and has an excellent pan fishery. (Pearce, et al) Many

members of the public have fished its 14 acres, particularly with their children. (Id.) For a small lake Spinnet is relatively deep, with a maximum depth of 43 feet. (T-11)

Hewitt Lake consists of 78 surface acres, and has a maximum depth of 88 feet. (Id.) Hewitt Lake is unique in part because it sits on the drainage divide and, like the channel between the lakes, flows to the north. (Miller) Numerous witnesses testified that it is exceptionally beautiful in the fall because it is lined by maple trees and other northern hardwood timber. (Hanson, et al; Ex. 187, p. 19)

4. During the period of 1991-1992, the DNR processed a culvert permit application from the previous owner of the property, Charles Palmer. (Ex. 197) No permit was ever granted to Palmer, who had sought to “repair an existing road to allow automobile traffic to travel between Hewitt and Spinnet Lakes.” (Id.)

Significantly, the DNR took the position that the area of the existing roadway was below the OHWM in 1991-1992, as it does in the current matter. (Lahti) Further, Mr. Lahti sent Palmer’s representatives the forms for an alternative analysis under NR 103, requiring that “alternatives be considered that will eliminate or minimize impacts to wetlands.” (Exs. 195-196) However, unlike the present case, the DNR did not seek the complete removal of the corduroy or roadway. (Ex. 192, pp. 50-51) According to Mr. Lahti, this was because the “roadway existed prior to the time Palmer purchased the property.” (Id.) Further, Lahti was convinced in 1991 that “the public was able to navigate over this area”, and that the road was not as significant as an obstruction to navigation in 1991 as it is now. (Ex. 192, p. 51) This was based upon the fact that then DNR Warden Sue Miller had either paddled over the road or easily portaged over it during her site investigation. (Id.)

Photos taken in connection with the 1991 investigation and 1992 permit application show that there was a roadway with substantially less fill present at that time. (Exs. 47-52) These photos also demonstrate that the road had begun to wash out and that deep ruts holding standing water had worn the road down to the corduroy logs. (Exs. 47-48; 51)

5. The instant matter came to the attention of the DNR in July of 1998, when Warden Pfeiffer received a complaint that “someone had constructed a road across a waterway that lies between Spinnet Lake and Hewitt Lake” in Iron County, Wisconsin. (Ex. 6) Warden Pfeiffer went to the property on August 8, 1998. The Warden went to the open area between the lakes. The Warden’s report states as follows:

At the place where the road passed through the open water there was an area, approximately 20 feet across, where the road had been filled to bring the road surface above the adjacent water level. As Warden Pfeiffer approached this filled area Warden Pfeiffer saw that the road bed to the east of the filled area was very soft and was saturated with water. Tire ruts and depressions in the road were filled with standing water. Warden Pfeiffer crossed this wet area to the filled area. The fill consisted of approximately 3 to 5 yards of dirt and sand. The fill was placed into a water way that runs between Spinnet lake and Hewitt lake. Warden Pfeiffer saw that there was a navigable water way extending north from

the filled area to Hewitt lake and south from the filled area to Spinnet lake. The water to the north and south of the filled area was approximately 2'-3' deep.

Based on Warden Pfeiffers observations it appears that 3 to 5 yards of fill had been placed into a water way that connects Spinnet lake and Hewitt lake. It appears as if the fill was placed on an old road bed where this road crossed the water way between Spinnet lake and Hewitt lake. It appeared as if this road passed below the ordinary high water mark at the place where the road crossed the open water. It appears as if, prior to placing of the fill, a navigable water way would have crossed this road and that vehicles travelling on this road would have found it necessary to ford this water way. The fill effectively blocks navigation between Spinnet lake and Hewitt lake.

Warden Pfeiffer took photographs of the filled area and left the scene at approximately 2:10 p.m. (Ex. 6)

6. Scudder described the fill as follows: he had an excavator on the property in connection with repair of numerous roadways on the property. Scudder asked that a load of fill be placed in an area away from the actual roadway between the lakes. Instead, the excavator dropped approximately four yards of fill (the contents of a 1.5 ton dump truck) squarely on the roadway. Over the next three days, it rained heavily, resulting in a "mess." (Scudder) Scudder admits that a large portion of the fill ran off into the wetlands adjacent to the road. After being contacted by Warden Pfeiffer, Scudder contacted the excavator, who removed "approximately half" of the fill.

7. Warden Pfeiffer made subsequent visits to the Scudder/Tapawingo property on August 16 and September 26, 1998. (Exs. 7-8) On August 16, 1998, Warden Pfeiffer observed that "some of the fill had been removed but that most of the fill was still in place. All of the fill on the road was still in place. A no trespassing sign had been placed on the filled area adjacent to the waters edge of Spinnet lake." (Ex. 8) The Warden advised Mr. Scudder that it was likely some type of enforcement action would be undertaken in connection with placement of the fill. On September 26, 1998, Warden Pfeiffer and Mr. Scudder met again, and the Warden went away with the understanding that Scudder "would remove the fill in the next 3-4 weeks." (Id.)

8. The Ordinary High Water Mark (OHWM) for Spinnet Lake is at elevation 98.12, relative to the fixed point of the invert of the culvert on Highway 6. The OHWM for Hewitt Lake is 97.73, relative to the same benchmark. (Goettel; Lahti) A majority of the roadway is below the OHWM set forth above for Spinnet and Hewitt Lakes. Four or five inches of the top of the roadway are above the OHWM. The bulk of the roadway is, accordingly, on public lakebed below the OHWM.

9. Mr. Scudder admitted that he knew that there was public access to from Spinnet to Hewitt Lake from the area between the lakes by people portaging over the roadway when he purchased the property. He also admitted that he had a hope of making the public waters of Spinnet and Hewitt Lakes "private lakes" at the time he purchased his property. (Tape #19)

This was based in part on his belief that Highway G, the location of the public roadway access, might not have been constructed in the planned location.

10. There is a public roadway access to Spinnet Lake from County Highway G. (Ex. T-11, p. 64) The public roadway access is listed in the DNR's official Wisconsin Lakes book. (T-11, p. 64) Numerous people testified that they regularly gained access to both Spinnet and Hewitt Lakes from this location. (See: Finding #15) The Iron County Board adopted a resolution which sought to abandon the longstanding public access from Highway G. At Scudder's expense, the County put up a guardrail in the area of the former public access. However, this resolution has never been approved by the Department of Natural Resources as required by Wis. Stat. § 80.41. Accordingly, there has been no legally effective abandonment of the public roadway access.

11. The roadway was constructed some time during the period of 1938-1950. No road appears in a 1938 aerial photo, but the road is visible in a similar photo from 1950. The road is likely an old logging road, consisting of logs placed in a "corduroy" pattern. Long-time DNR Forester Mark Hanson testified that such "primitive roads" were common in connection with logging operations. Many logging companies would remove these roads, even in past years. (Ex. 187, p. 23) This has now become the Standard Best Management Practice For Water Quality. (Ex. 151) However, in previous years it was common to just leave such log corduroy "there to let the water wash it out, which usually happened." (Hanson; Ex. 187, p. 23) In many cases, such crossing "were temporary roads and poorly constructed." (Id. p. 24)

12. While not rendering an opinion on the navigability of the channel, Lois Simon opined that there was a hydrologic connection and some open water between the two lakes based upon the review of aerial photos from 1937, 1938 and 1950. (Simon; Ex. 184, pp. 38-43) The earliest maps of the area show not only such a connection but the area as one large lake. (Ex. 91) This mapping, done in 1863, was fairly crude. However, subsequent aerial photographs from 1937 and 1950, confirm the existence of a hydrologic connection. The testimony of Mr. Luvra, confirms a longstanding navigable link between the lakes and is especially compelling because it relates to the time period when the road was constructed.

Mr. Luvra testified that he navigated the channel between Spinnet and Hewitt Lakes in 1948 and 1949. He specifically recalled his fishing line breaking on Hewitt Lake in 1948 and then going back for musky season in 1949. Luvra navigated the area between the lakes in his 12-foot Crestliner, and did not have to portage over any obstruction. Rather, he simply pulled up his 2hp motor and paddled through. The greater weight of the credible evidence supports a finding that the channel was navigable at the time of construction. (Exs. 96-A)

13. While the channel between the lakes was navigable, the greater weight of the credible evidence supports a finding that the roadway may have been lawfully constructed without a permit approximately 50 years ago. (Mickelson; Apfelbaum) The DNR did not carry its burden of demonstrating that the original placement of the corduroy logs was below the OHWM at the time of the construction.

There is no question that it was unlawful to place structures below the OWHM when the logs were placed. In 1933, the Wisconsin legislature specifically enacted a prohibition of structures on navigable waters codified in Wis. Stat. § 30.02(1)(b):

It shall be unlawful to deposit any material or to place any structures upon the bed of any navigable water where no shore line has been established or beyond such shore line where the same has been established. (Ex. 176)

There is a longstanding prohibition of structures in the beds of navigable waters and the state specifically required permits prior to the placement of such structures by 1949. There was no testimony that the existing roadway had ever been authorized by permit. However, the DNR has not carried its burden of proving that the original corduroy logs were placed unlawfully below the OWHM. Dr. Mickelson and Mr. Apfelbaum raised serious questions as to whether this was the case.

Mr. Steven Apfelbaum, a distinguished environmental scientist, conducted a technical study that sought to directly relate an analysis of dead trees to the OWHM determination. Using standard dendrochronology and three-ring analysis, Apfelbaum concluded that lake levels were unusually high at some point during the period of 1943-1950. This would account for the hundreds of standing dead trees that died during this period. Mr. Apfelbaum's tree study suggests that there was a sudden and rapid rise in water levels during the period of 1943-1950. Dr. Mickelson put this historic rise in the range of a foot and a half, and opined that it was more likely related to the construction of Highway G and placement of a culvert in connection with road construction than any natural change in water levels. While the record does not conclusively prove one way or the other whether the corduroy logs were placed above or below the OWHM, the best available evidence raises sufficient doubts to find that the log corduroy, but not subsequent fills, may have been placed lawfully.

14. While there is a question as to whether the original corduroy logs were placed lawfully, there is no question that the roadway structure has been subsequently unlawfully built-up to create an obstruction to navigation and a detrimental impact upon the public interest in both Spinnet and Hewitt Lakes.

The record is replete with testimony of members of the public and DNR staff who have regularly navigated over the roadway during the period of 1948 (Luvra) to 1998 and beyond. Several witnesses specifically remarked that the roadway was built-up considerably wider and higher than in previous years. (Kostroski, et al.) Further, the 1991 and 1992 photos demonstrate this point convincingly. (Ex. 51 and 48) Photos taken by Mr. Lahti from October 4, 1991 and September 18, 1992, reveal the corduroy logs in full view. (Id.) The recent photos show how much fill has been unlawfully placed over the top of these logs in subsequent years.

A clear preponderance of the credible evidence supports a finding that there have been repeated unlawful fills placed over the original placement. Further, all of these fills were placed below the OWHM, which has changed as a result of the placement of the culvert and construction of Highway G. Even giving Scudder/Tapawingo the benefit of the doubt that the log corduroy crossing was placed lawfully at the time of construction, there is no question that

the OHWM has risen substantially since that point in time. (Mickelson, et. al.) By 1991, Lahti had no doubt that the roadway was below the OHWM. Accordingly, all subsequent fills were unlawfully placed on public lakebed below the OHWM.

15. Numerous members of the public and DNR employees have gained access to both Spinnet and Hewitt Lakes from the channel between the lakes over many years. Like Mr. Luvra, Mr. Gerald Kostroski, an avid hunter and angler, has been frequenting the area since 1949. Gerald Kostroski testified that the road across the channel was under water “most of the time” and that he often saw the 6 to 8 inches of water over the road in his 51 years of visiting Spinnet and Hewitt Lakes. His son, Kevin Kostroski, remembers being cautioned as a teenager to stay in the ruts when driving across the road for fear of getting stuck. DNR employee James Cox testified of “canoeing right over the road” in the area between the lakes, and gaining access from Spinnet to Hewitt by means of the channel in 1983. This is consistent with an aerial photo from 1983, which clearly shows high water and apparent stream channel flowing over the roadway. (Ex. T-22) A retired DNR Forester, Marko Hanson, testified that he had navigated in the area between the lakes four times during the period 1974 to 1992. Like many others before and after him, Hanson put in a canoe at Highway G and then portaged over the roadway obstruction. DNR employee Dennis Scholl testified that he paddled over the roadway in a canoe in 1990. Pearce and both Gerald and Kevin Kostroski testified that they had put their boats in from trailers using the road access off Highway G and gained access from Spinnet and Hewitt through the channel. Former DNR Warden Susan Miller testified that she accessed Spinnet Lake from the public right of way off Highway G in the summer of 1990 to investigate complaints that Mr. Palmer was trying to prevent public access to Hewitt Lake. (Miller; Ex. 185, pp. 14-18, tapes 3-4) Miller testified that she was able to navigate up to the road barrier by way of the channel between the two lakes. Further, Miller was able to lawfully portage her 14-foot aluminum boat with a 10 or 15 Hp motor over the roadway. (Id. p. 19) Miller vividly recalled watching a flow in the channel area, because the flow went north because the area is located almost exactly on the great water basin divide. (Miller) Similarly, DNR Fish Biologist Jeff Roth testified that the roadway washed out in 1997, and that it was possible to float a canoe through the channel that year.

There is no question that the channel between the lakes meets the definition of a navigable stream. There is a long history of it being used for this purpose, with numerous others testifying that they were able to lawfully “portage” their small boats and canoes by stepping over the roadway.

16. The existing structure in its present built-up configuration materially obstructs navigation on the navigable channel and is detrimental to the public interest in navigable waters. The roadway has been unlawfully built-up during the period from 1991 to 1998. (Lahti; Ex. 48 and 51) Scudder’s placement of fill directly contributed to the creation of a material obstruction to navigation and to violations of the public rights in public waters as set forth in the findings above and below.

17. DNR Fisheries Technician James Cox testified that the roadway in its present configuration prevents fish from being able to migrate between the two lakes. (Ex. 191, p. 39) Further, the area adjacent to the roadway is the best available musky spawning habitat on either

lake. (Cox; Roth) DNR Fish Biologist, Jeff Roth, testified that there is significant habitat to be used as cover by fish in Spinnet Lake that is not available in Hewitt Lake. Accordingly, allowing the free movement of fish would improve the fishery in both lakes. (Cox; Scholl; Roth) The placement of fill in the wetland areas adjacent to the roadway since 1991, including the fill by Scudder in 1998, has had a detrimental impact upon the public interest in maintaining fishery values.

18. Duane Lahti, DNR Lake Superior Team Supervisor, testified that there were numerous old logging crossings placed on public lakebeds across northern Wisconsin. There would be detrimental cumulative impacts to the navigable waters of the state if all of these crossings were expanded and maintained by repeated filling of these areas whenever the crossings started to deteriorate. (Lahti) The cumulative impacts to wetlands would also be significant. (Trochell; Lahti; Goettel)

19. The U.S. Army Corps of Engineers (the Corps) issued a decision on September 19, 2002, "that both Spinnet and Hewitt Lakes, and their adjacent wetlands, are subject to regulations by the Corps under Section 404 of the Clean Water Act." (Ex. 172) With respect to the Scudder property, the Corps further found as follows:

The wetlands on either side of the road separating Spinnet and Hewitt lakes are considered adjacent. Both wetlands, at the location of the road, have been determined to be at or below the Ordinary High Water levels of the two lakes, and are separated only by a man-made barrier.

The Corps has not yet determined if the road itself continues to meet the criteria necessary to be defined as a wetland. (Ex. 172)

On June 13, 2002, DNR Wetland Ecologist Patricia Trochlell conducted a wetland delineation at the site in the area between the lakes. (Exs. 148-149) Trochlell concluded as follows:

Wetlands delineated in an area between Spinnet and Hewitt Lakes show a distinct boundary, especially obvious due to topographic change except where a roadway has been constructed. Based upon borings and other data, the area where the roadway has been constructed would have met the wetland criteria. The more recently filled roadway may meet the criteria for classification as wetland. (Ex. 149)

20. The provisions of Chapter NR 103 relating to water quality standards for wetlands are applicable to "all department regulatory" actions, including "permits, reviews, approvals and other actions under chs. 23 and 26 to 31, Stats." (Goettel; Lahti) See: Wis. Admin. Code NR 103.06(1) This includes the instant enforcement action brought pursuant to Wis. Stat. § 30.03(4)(a).

21. Scudder admitted that a large portion of his 1998 fill material made it into the wetlands adjacent to the roadway. The preponderance of the credible evidence demonstrates that

the 1998 fill activity by Scudder had a detrimental impact on wetland communities adjacent to the roadway. (Trochlell; Goettel; Lahti)

DNR staff concluded that .04 acres of fill had directly impacted the wetlands in the area off the roadway. Further, there were .2 acres of wetlands that had secondary detrimental impacts from the roadway “sloughing off” the roadway. (Goettel; Trochlell; Ex. 183, pp. 307-309) This wetland area was rated as having “exceptional value” as fish habitat and is the best available murky spawning area on either lake. There is no question that a large portion of the 1998 fill directly impacted this wetland area. (Scudder)

22. Taking into account costs and logistics in light of overall project purposes, there are reasonable alternatives to the filling of wetlands adjacent to or on the roadway. These include the possibility of a boardwalk that allows for the free flow of water underneath. (Lahti; Storlid) Two types of boardwalk alternatives were discussed at hearing: first, a standard three-foot wide boardwalk that would allow the free flow of water and fish underneath and, second, a boardwalk with an elevated section five feet wide that would allow the passage of canoes and small fishing boats. Either boardwalk would allow Scudder to conveniently reach the portion of his property that is served by the existing roadway. However, either boardwalk type would have significantly less of a detrimental impact upon the functional values of the wetlands and public interest in the navigable waters of the channel. A boardwalk would allow fish to pass between the two lakes and would have less of a detrimental impact upon fishery values than the existing fill. A three-foot wide boardwalk would allow for the easy, step-over portaging of small fishing boats and canoes. A boardwalk with a four to five foot wide elevated section would allow for actual navigation under the elevated section. A boardwalk would have significantly less ongoing damage to the wetlands, because the existing roadway will need to be re-filled from time to time, resulting in short-term impacts to water quality from sedimentation run-off.

23. Scudder/Tapawingo has not provided any “reasonable assurance” that the regular maintenance of the roadway can be undertaken in a manner which meets water quality standards set forth in Wis. Admin. Code NR 299 and NR 103. Scudder/Tapawingo presented no proposed maintenance plan addressing detrimental impacts to wetlands associated with fill activities. Further, no “alternatives analysis”, as required by NR 103, has been prepared to consider alternatives which would have less detrimental impacts upon wetland functional values.

24. There has been no showing that any actions of Scudder/Tapawingo contributed to the creation or enlargement to the man-made “notch” which contributes to lower water levels. While it would be in the Scudder’s interest to have lower water levels—because this would have the effect of reducing water flow in the area between the lakes—there is no factual basis for an enforcement action against Scudder/Tapawingo with respect to the notch. Further, at hearing Scudder indicated at least on a preliminary basis that he would voluntarily allow the DNR access to the lake to undertake necessary repairs of the notch. Significantly, the notch area is located below the OHWM and thus on public lakebed. (Lahti) The DNR has authority to undertake remedial repairs in this area so long as Scudder/Tapawingo allows access from his property. (Lahti)

25. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 105, regarding assessment of environmental impact.

## DISCUSSION

The resolution of this case turns on two key questions: a) is the area of the roadway below the OHWM and thus public lakebed; and b) does the fill have a detrimental impact upon the public trust and wetland functional values? The greater weight of the credible evidence supports affirmative answers to both of these questions. Accordingly, a third question arises: how much of the fill is it appropriate for Scudder/Tapawingo to remove, given the fact that the roadway has been in place so long? The record is less clear on this issue, as Scudder has raised serious questions as to whether the original corduroy logs were placed above or below the OHWM. Under these circumstances, the Division does not grant the DNR's request for complete removal of the roadway.

Instead, the record supports an order requiring removal of all fill over the corduroy logs, but not the logs themselves. Such removal will result in a road with far less impact on the public interest in maintaining fishery values, will be far less obstructive to navigation, and will have less detrimental impacts to wetlands. (Lahti; Goettel) The remaining log "road" will also still serve its basic purpose of allowing access to the western portions of Scudder's property.

## EVIDENTIARY STANDARD

The DNR bears the burden of proof in this enforcement action against Scudder. Wis. Admin. Code § HA 1.12(3) With respect to the burden of proof, Scudder argues that the evidentiary standard requires proof by "clear and convincing evidence". The DNR argues that the standard is whether there is "substantial evidence" to support the DNR's proposed action. Both of these proposed standards are wrong. Scudder cites no relevant DNR administrative action, and the DNR cites the standard of review for judicial review but not the hearing. The proper evidentiary standard is a "preponderance of the evidence" § HA 1.17(2), which has the same meaning as the usual civil burden "the greater weight of the credible evidence." HA 1.02(9)

## OHWM ISSUES

The dispositive jurisdictional issue is whether the roadway and the fill placed on it in particular are above or below the OHWM. The greater weight of the credible evidence demonstrates that the roadway is below the OHWM of both Hewitt and Spinnet Lakes. The DNR clearly identified marks and stains in both 1991 and 1999, that made it obvious that this channel area, and the vast majority of the roadway itself, was well below the OHWM. To better describe the location of these indicators, the Department undertook a survey which ties the OHWM line to a fixed-point (the culvert) elevation.

Goettel and Lahti determined that the OHWM for Spinnet Lake to be elevation 98.12 and 97.73 for Hewitt Lake. Scudder's experts placed the OHWM much lower, one of them even

below the existing water level. Dr. Mickelson determined an OHWM of 94.76 for both lakes. (Ex. T-28) Apfelbaum's numbers were similar to Mickelson's – a mean of 94.2 for Hewitt and 94.9 for Spinnett. Using the same elevation scale, the existing water level of Hewitt Lake is 94.2. (Ex. T-28) The DNR experts' numbers are far more reasonable.

It must be remembered that none of the elevations described by either side actually reflect mean sea level datum, but are only elevations expressed relative to known fixed points. This makes comparison of the numbers over time confusing. This effort allowed Scudder an opportunity to critique the DNR's survey results and techniques at length. But one must exercise caution in considering elevation values connected with the OHWM. For example, a survey submitted to the DNR by Scudder and undertaken by Border Lakes Surveying and Development, Inc., places the water surface level of Hewitt Lake at 96.7 and the water surface level of Spinnett Lake at 96.9 as of the survey date of May 27, 1999. (Ex. 63 A) This is more than two and a half feet higher than the values that Earth Tech found on October 16, 2001 (T-28), and the same amount above Scudder's suggested OHWM. Both of these surveys were submitted by Mr. Scudder. The 1999 survey notes that in 1970 DNR placed the Hewitt water level at 95.15, also well above Scudder's suggested OHWM.

More fundamentally, none of Scudder's experts provided any sound basis for a reasonable alternative understanding of the OHWM of these lakes in 1998 or the present time. The DNR Lake Superior Team Leader, Mr. Lahti has conducted hundreds of OHWM determinations over many years. In both 1991 and in connection with the Scudder fill, Mr. Lahti concluded that the road was well below the OHWM. By way of contrast, Apfelbaum admitted that he was not an expert on OHWM determinations. Dr. Mickelson has more experience in making OHWM determinations, but his numbers are very similar to Apfelbaum's and are not persuasive for several reasons. First, he did not even walk the shoreline around Hewitt Lake, but simply estimated that the water levels were similar between the two lakes. Second, he relied heavily on dead trees and specifically admitted that there were other available indicators that he did not consider that Goettel and Lahti did. Third, the conclusions of Scudder's experts are not credible. Their OHWM determination leads to an absurd result that places the OHWM below the existing water levels for Hewitt Lake, and within inches of the existing water level for Spinnett Lake. (Apfelbaum T-29, T-6) This, even as the Lake Superior basin is undergoing historic or near-historic low water levels. Dr Mickelson admitted that this was counter-intuitive and a less likely scenario because water levels on the Great Lakes reflect precipitation over a ten-year period. (Mickelson) Further, there were numerous credible witnesses who testified that water levels were consistently higher than at present over many years. (See: Finding #15) Under these circumstances, it simply does not make sense that the OHWM is at/or lower than the existing water level of Hewitt Lake.

It must be noted that even if one accepted Dr. Mickelson's values, he still located much of the roadway as below the OHWM. On Exhibit T-28, Earth Tech gave the top of the roadway a value of 95.98 and Mickelson's OHWM value is elevation 94.76.

The DNR's determination used more indicators and better reflects its state-wide practice and the record in this matter. Former DNR Water Management Specialist Mike Goettel did the OHWM determination, with assistance from Duane Lahti. Both have been thoroughly trained

and are well experienced in doing OHWM determinations. Goettel is a registered professional engineer, and also has many years of survey experience by helping his family survey business. During the hearing, Mr. Goettel testified as to how he went about doing the OHWM determination, and showed photographic evidence (Exs. 71 – 80) the survey work that was done as part of the determination process. By finding and identifying the physical and biological indicators showing OHWM characteristics, Mr. Goettel was able to ascertain and record (See his field notes, Ex. 103 a & b) the location of the OHWMs for both Spinnet and Hewitt Lakes, and assign an elevation. He then transferred the elevations to the area between the lakes to correlate the OHWM locations in the channel area. This transferring method is typical and has been the long-standing method for nearly 90 years. (See *Diana Shooting Club*, 156 Wis. 261, 272 (1914))

Most importantly, none of Scudder's experts testified that Goettel and Lahti used the wrong biological indicators. Rather, the testimony of Dr. Mickelson was that the DNR used other indicators which he himself did not. Finally, it must be noted that the U.S. Army Corps of Engineers agreed with the DNR determination that the area between the lakes was public lakebed below the OHWM, at least with respect to the adjacent wetlands impacted by the 1998 fill. (Ex. 172) "The wetlands . . . have been determined to be at or below the OHWM levels of the two lakes." (Id.) A clear preponderance of the evidence supports a finding that the roadway is below the OHWM.

#### § 30.122 ISSUES

Apfelbaum's study and Dr. Mickelson's testimony do not provide a sufficient basis to conclude that the DNR's 1998 OHWM was incorrect. Rather, these witnesses raised serious questions about whether the placement of the log corduroy was above or below the OHWM at the time of construction of the roadway. Mickelson sought to estimate the pre-1950 OHWM at 93.36, relative to the Earth Tech values. (Ex. T-28) This is only an estimate, but the Apfelbaum tree study does suggest that the construction of Highway G raised the water level significantly. Accordingly, the Order does not require total removal of the roadway, but removal down to the corduroy logs which may have been placed lawfully. There is no question that the roadway has been built up since 1991 and that Scudder's 1998 placed materials below the OHWM and into adjacent wetlands.

Scudder argues that § 30.122 effectively "grandfathers" the roadway in a lawful structure. That statute provides as follows:

All permanent alterations, deposits or structures affecting navigable waters, other than boathouses, which were constructed before December 9, 1977 and which did not require a permit at the time of construction, shall be presumed in conformity with the law, unless a written complaint is filed within 180 days of December 9, 1977. Upon the filing of a complaint, the department shall proceed with an action to enforce the applicable statutes. Id

The Order set forth below reflects a finding that the corduroy log base, but not the entire built-up roadway in its present configuration, may meet the standard for a non-conforming unauthorized structure.

Certainly the fact that a portion of a structure may have been lawful does not give a riparian owner carte blanche to increase the size of such a structure. This has been the long-standing practice of the DNR, and is reflected in the fact that § 30.12(2) requires public notice and a permit application “to build or maintain” a structure on the bed of a navigable waterway. Accepting Scudder’s position would be a significant danger to the public interest in navigable waters of the state. Any small pier, bridge or road could be expanded to any size and still be considered a lawful unauthorized structure. This defies both the law and the common sense that gives the law its flexibility and wisdom. Further, even structures permitted under § 30.12(2) are regularly subject to a condition that the structure be removed if it becomes a material obstruction to navigation. It would be grossly unfair to give unpermitted structures greater rights than permitted structures. The Division declines to do so.

#### § 30.12 STANDARDS

The structure in its present configuration requires a § 30.12(2) structures permit because it “materially obstructs navigation” and is “detrimental to the public interest” in maintaining fishery values and because it has a detrimental impact upon important wetland functional values. That statute provides as follows:

(2) PERMITS TO PLACE STRUCTURES OR DEPOSITS IN NAVIGABLE WATERS; GENERALLY. The department, upon application and after proceeding in accordance with s. 30.02(3) and (4), may grant to any riparian owner a permit to build or maintain for the owner’s use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest. The procedures in this subsection do not apply to permits issued under sub. (3).

Section 30.02(3) and (4) requires that an applicant to “maintain” or enhance an existing structure provide a public notice by publication. The navigable waters of the State of Wisconsin have been held in trust for the public since before the state was admitted to this great union. As trustees, the public is entitled to notice publication of actions which have an impact upon navigable waters. Because there was no after-the-fact permit application, no such notice was given in this matter.

There is no question that the structure in its present configuration is a “material obstruction to navigation” within the meaning of the statute. (Goettel; Lahti; public testimony) Lahti specifically noted that the DNR did not seek full removal of the structure in 1991, because “the public was able to navigate over this area” at that time. (Ex. 192, p. 51) From 1991 to the present time the structure has been enlarged and expanded to be more of an “obstruction to

navigation”, making it in “violation of statutes relating to navigable waters” and/or “public rights relating to navigable waters” within the meaning of Wis. Stat. § 30.03(4)(a).

Further, the expansion of the structure has made it difficult or impossible for fish to go back and forth between Hewitt and Spinnet Lakes, and has directly filled prime mucky spawning areas. There is no question that the “embarrassing mess” of Scudder’s 1998 fill had a detrimental impact upon the adjacent wetlands, which both sides agreed was “exceptional” fishing habitat. (See Findings 15 and 19, Storlid) The DNR has carried its burden under both § 30.12(1) and (2). Scudder “deposited materials” upon the bed of a navigable water where no bulkhead line has been established without a required permit. The resulting structure “materially obstructs navigation” and is detrimental to the public interest in navigable waters.

### WETLANDS ISSUES

The record is very clear with respect to wetlands issues: there is no serious doubt that the repeated filling of the roadway have had a detrimental impact on wetlands adjacent to the roadway. This was Mr. Lahti’s judgment in 1991, and remains the position of every DNR expert today. It is clear from the record that the logging road ruts and washes out over time. This was true in 1991, at the time of the Palmer culvert application and again in 1998. The record is equally clear that on both occasions the result of the effort to maintain the roadway had a detrimental impact on the adjacent wetlands. Mr. Scudder admitted as much himself, and described his “embarrassment” at the “mess” the fill had created in the adjacent wetland areas. There was no proposed road maintenance plan submitted by Scudder that would give any reasonable assurance that such impacts could be limited in connection with future repairs of the road. These will almost certainly be necessary, given its placement in a channel in a low area between two lakes. The record is clear that these wetlands are of high quality, and are of exceptional value as to fishery values. The greater weight of the credible evidence supports a finding that Scudder’s 1998 fill had a detrimental impact upon wetlands. Further, there are reasonable alternatives to filling in wetlands to accomplish the basic project purpose of gaining easy access to the western portion of Scudder’s property.

### REMEDIES

The most difficult question this case raises is the fairness of ordering complete removal of the roadway, given that it has been in place for so long. This issue concerned Mr. Lahti, in 1991, and remains a difficult one today. Ultimately, the failure of the parties to reach a settlement involving placement of some type of boardwalk, and the failure of Scudder to present either an after-the-fact permit application or any type of plan for ongoing maintenance of the roadway leaves the Division with little choice but to order removal of the roadway down to the corduroy log base.

NR 299.05(3)(e) requires that there be “reasonable assurance” that a discharge meet water quality standards, including the standards for wetlands found in NR 103. There is no such “reasonable assurance” in the record that maintenance of the roadway will meet the water quality standards for wetlands. Rather, a clear preponderance of the credible evidence indicates that the

roadway will require ongoing maintenance fills which will have a direct and cumulative impact on wetlands.

More fundamentally, if there is one central tenet of the public trust doctrine, it is that Wisconsin has, since its days as a territory, opposed the private placements of structures which obstruct navigation on the public waters of the state. The road in its present configuration is a classic “obstruction to navigation,” which the Territorial Legislature prohibited as early as 1841. (Ex. 176) The Wisconsin Supreme Court also specifically adopted the language that such a structure “not materially obstruct navigation” in 1887. (See: *State v. Carpenter*, 68 Wis. 165 (1887)) The case of *Baker v. Voss*, 217 Wis. 415 (1935) is illustrative of the public trust case law during the period when the roadway was constructed. The Wisconsin Supreme Court held that no one may erect a barrier in navigable waters that interferes with the public right to navigate or fish such public waters. If such a barrier exists, an injunction can be had to enjoin its continuance. *Id.*; p. 47 The law is very similar today: the DNR instigated this enforcement action and seeks removal of this obstruction to navigation. The Department has even indicated its willingness to bear the expense of removal of all but the fill placed by Scudder in 1998. (Lahti)

Accordingly, the best available remedy is to order removal of all fill down to the log corduroy. There is every reason to believe the logging road was a temporary placement to facilitate logging operations in the area. Over the years, the corduroy logs have been built up to the present massive roadway across the navigable channel. Mr. Lahti testified that there was a conspicuous raising of the elevation of the roadway from 1991 to 1998. The photos emphatically bear this point out. The structure was placed unlawfully without a permit and must be removed down to the original corduroy logs in light of the fact that Scudder has refused to submit an after-the-fact period application or provide any reasonable assurance that the roadway could be maintained in a way compatible with the public interest in navigable waters and the functional values of the wetland area. It is hoped that an application for a boardwalk would be approved, based upon the extensive record developed at hearing there is every reason to believe it could be approved. However, the public is entitled to notice publication.

## THE NOTCH

Unlike the roadway, the DNR did not establish the elements of the claim relating to the alleged unlawful diversion of water through the artificial notch. Scudder testified credibly that he did not even know that the notch existed at the time he purchased the property. Mr. Lahti testified that in twenty-one years as a DNR regulator, he had never seen an enforcement action similar to the notch case—where there was no direct action of the responsible party which contributed to the diversion of water. There was no evidence that Scudder contributed to any enlargement of the “notch” outlet. Further, at hearing he voluntarily agreed, at least on a preliminary basis, to allow the DNR to repair areas of the notch below the OHWM.

## CONCLUSION

It is unfortunate that the parties could not settle this case, because the obvious resolution is some type of boardwalk that would allow the free flow of water and navigation and still serve

the “project purpose” of allowing the Scudders convenient access to their extensive property on the other side of the channel. The possibility of such a compromise was raised at hearing on September 25, 2002. However, to settle this case along such a sensible compromise might well undercut Mr. Scudder’s effort to turn two beautiful public lakes into his own “private” lakes for all practical purposes.

Instead, Scudder views himself as a victim of an unreasonable Department of Natural Resources which seeks an order requiring him to allow removal of a roadway which has been in place for over fifty years. Scudder acknowledged that an alternative possibility is that he may have purchased a piece of property that had an unlawful roadway obstruction to navigation upon it. He framed the issue as whether he had used “due diligence” with respect to his inquiry prior to purchasing the property. In this regard, it would have been reasonable for him to consult the DNR files prior to purchasing this property, particularly in light of his express purpose of trying to make these two lakes “private lakes” with no public access. Had he done so, Mr. Scudder would have learned that there was a culvert permit application relating to the roadway which specifically stalled because the prior owner had failed to provide the required “alternative analysis” relating to wetland impacts, which Mr. Lahti properly sought under authority of NR 103. To this date, there still has been no “alternatives analysis” presented as required by NR 103 for activities, such as Mr. Scudder’s 1998 fill, which have a detrimental impact upon wetland functional values. The DNR file would have also made it clear that there was an ongoing dispute about public use of the channel area to gain access from Spinnet to Hewitt lakes. But this fact was already well known to Mr. Scudder. Under these circumstances, it is difficult to accept Scudder’s view of himself as a victim of an out-of-control DNR. He made a conscious business decision to try to wrest these two lakes from the public waters, knowing that one possibility would be that public access through the channel would continue.

The Order set forth below is not an effort to “split the baby,” or roadway, in effort to strike a compromise. Rather, the order requiring removal of all fill down to the corduroy logs reflects the evidence presented at hearing. The DNR did not carry its burden to show that the logs were originally placed below the OHWM at the time of construction. However, the DNR did carry its burden in demonstrating that the fill by Mr. Scudder in 1998, and any other fills from at least 1991 to 1998, violated Wis. Stat. Chapter 30 and Wis. Admin. Code NR 299 and 103 because it raised the roadway up to a level that obstructs navigation, is detrimental to the fishery in both lakes, and has a detrimental impact upon adjacent wetlands.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.03, 30.12, 30.14 and 227.43(1)(b), and in accordance with the foregoing Findings of Fact, to issue an order for removal of unlawful structures on the beds of navigable waters.
2. Scudder/Tapawingo is a “riparian owner” within the meaning of Wis. Stat. § 30.12.
3. The public trust doctrine originated in the Northwest Ordinance of 1787 and the Wisconsin Constitution, Article IX, Section 1.<sup>[fn1]</sup> See *Gillen v. City of Neenah*, 219 Wis.2d

806, 820, 580 N.W.2d 628 (1998). The state holds title to the beds of lakes, ponds, and rivers as follows:

“The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in [the state] at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law.”

*State v. Trudeau*, 139 Wis. 2d 91, 101, 408 N.W.2d 337 (1987) (quoting *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 425, 84 N.W. 855 (1901)). This includes the beds of the Great Lakes as well as lesser inland waters. *Id.* Public ownership of the bed of a lake applies whether the water is deep or shallow, and extends to areas covered with aquatic vegetation within the ordinary high water mark of the body of water in question. [fn2] *Id.* at 103-04.

4. A riparian owner has a qualified right to the land between the actual water level and the ordinary high watermark: he may exclude the public there from, but may not interfere with the rights of the public for navigable purposes. *State v. McFarren*, 62 Wis. 2d 492 (1974). The roadway in its present configuration interferes with the rights of the public for navigable purposes.

5. By ordinary high-water mark (OHWM) is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Diana Shooting Club v. Husting*, 156 Wis. 261, 272 (1914). Accord: Wis. Admin. Code NR 320.03(4). The “distinct mark” must be manifested by “erosion, destruction of terrestrial vegetation or other easily recognizable characteristic”; however, only one of the preceding manifestations need be present to qualify as such a mark. The phrase “other easily recognized characteristic” allows flexibility as to what indicators in the natural environment qualify as the water-established mark. The roadway is below the OHWM and is, accordingly, unlawfully placed on a public trust area without a permit.

6. If the DNR learns of a possible violation of statutes relating to navigable waters or possible infringement of the public rights relating to navigable waters, and the DNR determines that public rights may not be adequately served by imposition of a penalty or forfeiture, the DNR can seek an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interest of the public in navigable waters. § 30.03(4)(a). The Order set forth below is necessary to fully protect the interest of the public in the navigable waters of the state.

7. The existing roadway described in the Findings of Fact constitutes a “structure” within the meaning of Wis. Stat. § 30.12. The placement of fill to “maintain” this structure required a public notice and permit by the plain language of § 30.12(2). The 1998 fill by

Scudder unlawfully placed fill material on the bed of a navigable waterway where no bulkhead line has been established without the required permit. Wis. Stat. § 30.12(1).

8. The fill described above violates the public interest in navigable waters because the placing of fill and on-going maintenance of the roadway have direct and cumulative “detrimental impacts to the public interest” in the navigable channel, and both Hewitt and Spinnet Lakes. The project is a “material obstruction to navigation” within the meaning of Wis. Stat. § 30.12(2). The roadway has a detrimental impact upon the public interest in gaining access to public waters, as well as a detrimental impact on maintaining fishery values and preserving wetland functional values. Scudder/Tapawingo has “maintained” the unlawful roadway structure without a permit as required by Wis. Stat. § 30.12(2). Scudder has also unlawfully placed fill on the bed of a navigable water within the meaning of Wis. Stat. § 30.12(1).

9. All permanent alterations, deposits or structures affecting navigable waters, other than boathouses, which were constructed before December 9, 1977 and which did not require a permit at the time of construction, shall be presumed in conformity of the law unless a written compliant is filed within 180 days of December 9, 1977. § 30.122 The log corduroy portion of the roadway, but not subsequent additive fillings, are in conformance with this provision.

10. The provisions of Chapter NR 103 relating to water quality standards for wetlands are applicable to “all department regulatory” actions, including “permits, reviews, approvals and other actions under chs. 23 and 26 to 31, Stats.” (Goettel; Lahti) See: Wis. Admin. Code NR 103.06(1)

11. The project proponent bears the burden of proof in water quality certification procedures. The hearing is a de novo hearing as to whether the water quality certification shall be granted, granted with conditions, denied or waived. Wis. Admin. Code 299.05(6). Scudder/Tapawingo has not applied for water quality certification.

12. The placement of fill by Mr. Scudder to maintain an access road is not a wetland dependent activity within the meaning of Wis. Admin. Code § NR 103.07(2) and NR 103.08(4)(a)(1), because construction of the access road is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

13. There are currently “practicable alternatives”. . . “available and capable of being implemented” to the reduced fill area and access road, “after taking into consideration cost, available technology and logistics in light of overall project purposes” within the meaning of Wis. Admin. Code § NR 103.07(2). These include but are not limited to placement of a boardwalk or bridge at the site, or use of the alternative access available from the county highway. Scudder/Tapawingo has not presented the required “alternatives analysis”.

14. The proposed project results in violation of the standards contained in Wis. Admin. Code § NR 103.08(3) in that practicable alternatives to the proposed project which will not adversely affect wetlands exist and the proposed project results in significant adverse impact

to the functional values of the affected wetlands, significant adverse impacts to water quality and or other significant adverse environmental consequences.

15. There has not been a legally effective abandonment of the longstanding public access to Spinnet Lake off County Highway G. No resolution, ordinance, order or similar action of any town board or county board or committee thereof discontinuing any highway, street, alley or right-of-way that provides public access to any navigable lake or stream shall be effective until such resolution, ordinance, order or similar action is approved by the Department of Natural Resources. Wis. Stat. § 80.41.

16. The DNR must consider the “cumulative impacts” of many small projects on the public waters of the state. *Sterlingworth Condominium Ass’n v. DNR*, 205 Wis. 2d 710, 721-22, 556 N.W.2d 791 (Wis. Ct. App. 1996) Citing *Hixon v. PSC*, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966). The Supreme Court opinion expressly noted that a “little fill here” may not appear significant in itself but can become very significant when added with a “little fill there.” *Id.*

17. The DNR has not demonstrated that Scudder/Tapawingo has “diverted water” within the meaning of § 30.18(2). Unlike § 30.12(2), the water diversion statute does not specifically require a permit to “maintain” an unlawful diversion of water. Because there was no testimony that Scudder/Tapawingo undertook any action to “divert waters” the DNR has not demonstrated that the diversion of water by means of the “artificial notch” requires a permit by Scudder/Tapawingo.

18. The project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)4. Type III actions do not require the preparation of a formal environmental impact assessment.

## ORDERS

WHEREFORE IT IS HEREBY ORDERED, that the action against Scudder/Tapawingo for unlawful modification of a shoreline under § 30.19 be DISMISSED.

IT IS FURTHER ORDERED, that the action with respect to a violation of § 30.18 for diversion of water be DISMISSED.

IT IS FURTHER ORDERED, that the action with respect to the unlawful placement of fill on the bed of the navigable waterway between Spinnet and Hewitt Lakes be removed to the following extent:

Scudder/Tapawingo shall remove all fill placed in 1998. Based upon the DNR’s agreement or the record, the DNR shall prepare a plan to remove all fill down to the original corduroy logs and shall make the plan available to Scudder/Tapawingo at least 14 days prior to commencing any fill removal. The DNR and/or its consultant shall make every effort to preserve the structural integrity of the corduroy log crossing, but it is expressly understood that this

structure is a temporary one that will likely eventually fail. All reasonable measures shall be employed to protect upland private property and the adjacent wetland which are below the OHWM. All fill in wetland areas reasonably believed to have been placed after 1991 shall be removed and the wetlands restored to the extent possible.

IT IS FURTHER ORDERED, that until such time as the abandonment of the public right-of-way is approved by the DNR pursuant to Wis. Stat. § 80.41, that Scudder/Tapawingo remove the "No Trespassing" sign and allow reasonable portaging across the roadway in conformance with Wisconsin law.

IT IS FURTHER ORDERED, that the action with respect to an unlawful wetland fill be that the fill be removed as set forth above, that the removal be undertaken at such time and in such a manner as to reduce detrimental impacts from fill removal.

Dated at Madison, Wisconsin on February 7, 2003.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 264-9885

By: \_\_\_\_\_  
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

### NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.